UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	.	Case No. 2:13-md-02460
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	.	U.S. Courthouse
NIASPAN ANTITRUST	.	601 Market Street
LITIGATION	.	Philadelphia, PA 19106
	.	
	.	April 29, 2019
. . . . .	.	3:09 p.m.

TRANSCRIPT OF TELEPHONE STATUS CONFERENCE
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT COURT JUDGE

TELEPHONIC APPEARANCES:

For the End-Payor Putative Class:	Wexler Wallace, LLP By: KEN WEXLER, ESQ. JEFFREY KODROFF, ESQ. 55 West Monroe Street Suite 3300 Chicago, IL 60603 (312) 346-2222
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TELEPHONIC APPEARANCES CONTINUED.

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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(Proceedings commence at 3:09 p.m.)

THE COURT: This is Judge DuBois. Good afternoon.

UNIDENTIFIED: Good afternoon, Your Honor.

THE COURT: We're going to conduct our regular status conference in the Niaspan Antitrust Litigation, MDL No 13-2460.

You've talked among yourselves since you've come on the line. Is every defendant and every plaintiff -- well, the two plaintiff classes represented? Everyone on the record?

ALL: Yes, Your Honor.

THE COURT: All right. Maybe we should start with an item that is not on your agenda. We talked about it very briefly at the last conference and it concerns the most recent conditional transfer order. That order was docketed. I've received no objections. I'm referring to the tagalong case, MSP Recovery Claims Series LLC, et al v. AbbVie, transferred from the Southern District of Ohio.

Is there any objection to treating that tagalong case in the same way as the others and to issuing the order that I issued -- the same order that I issued with respect to the other tagalong actions? I hear --

MR. WEXLER: Your Honor --

THE COURT: Yes?

MR. WEXLER: -- this is Ken Wexler. Jeff Kodroff and I have spoke with counsel for the MSP plaintiffs. They stayed their case and I don't know how that impacts what you just

suggested.

THE COURT: I'm sorry. You said they what?

MR. WEXLER: They want to stay their case because the -- in -- they are really -- they come under the umbrella of the end-payor class action. And so they are willing to stay their case and let us just proceed.

THE COURT: Well, the typical order consolidates that case with the end-payor actions. It -- I'm just -- it encloses their individual case. It consolidates their case with the end-payor actions, as I said, and closes their individual case. Maybe we ought to wait to hear from them.

Did anyone tell them about this conference? We did not. We did not notify them of the conference.

MR. WEXLER: We did, but we didn't invite them. I didn't know that they were invited, particularly since they want to not really proceed, but I think stand on the sidelines while we do. But we'll -- if Your Honor wants to hear from them, we will convey whatever Your Honor likes.

THE COURT: Well, I'm just looking to see what the docket discloses. I have the docket entries, so I know who they are, I think. It's a very -- yes, I do. We have their --

MR. KODROFF: Your Honor, this is Jeffrey Kodroff. I was with Ken on the call. We gave them copies of the case management order, the initial case management orders, and the leadership structure, so they had full knowledge of what's

going on. They apparently looked at the docket themselves as well and they recognize that they were simply another class complaint. They are a member of the end-payor class and whatever, you know -- they're willing to stay their case. If you want to consolidate it in, I think the bottom line is they're not going to cause any delays in what is taking -- currently taking place amongst all the parties.

THE COURT: The practice and procedure order that I issued a long time ago, December of 2013, covering all cases and all tagalong cases, provides, and I'll quote: "Any case which is hereinafter filed in this court or transferred from another court related to the direct purchaser action" -- and then it goes on to cover the end-payor cases. Same thing. They're both treated the same way and they're consolidated, unless an objection is filed within 14 days of notice to counsel for the plaintiffs.

We'll have to send them a copy of the order, give them a chance to object, so I'll take no further action with respect to the MSP case.

All right. Now I'll turn to your agenda. Well, before I do, is there anything else that needs to be said about the MSP case?

(No audible response.)

THE COURT: Hearing nothing, we'll turn to your agenda. The parties' report on the completion of expert

discovery is the first item.

MR. SENATOR: Your Honor, this is Stuart Senator for the AbbVie defendants. The deposition of plaintiff's expert (indiscernible) McGuire was completed on the schedule set by the Court. The deposition of Tier Canu (phonetic), defense expert, was set by the Court for this Thursday and we've had to move that one week to next week because of a medical issue in Mr. -- in Dr. Canu's family that required his attention without delay.

THE COURT: Well, I --

MR. SENATOR: We've agreed on a new date. I believe it's May 8th; next week, May 8th. And that should not interfere with any other proceedings in this case, a one-week delay.

THE COURT: All right. And that's fine, Mr. Senator. Except you said the deposition set by the Court. They were included in my order, but the dates were set by the parties. I --

MR. SENATOR: You're absolutely correct, Your Honor. I didn't mean to suggest otherwise. All I was intending to convey was that they were in a court order.

THE COURT: All right. Yeah, well, they were after you advised me of the dates. And the --

MR. SENATOR: Absolutely.

THE COURT: It's actually a six-day delay is

appropriate. I'm just concerned with anything that holds up our existing schedule. All right. Anything else on the completion of expert discovery?

(No audible response.)

THE COURT: Hearing nothing, let's go to the second item on your agenda: time limits and order of argument. I think the end-payor plaintiffs' class certification motion presents a myriad of issues. And I'm afraid that if we start there, the direct-payor purchasers are not going to get their day in court. And so what I think we should do is start with the direct -- the DPP motion. And I have your proposals and they don't differ by much. The difference is an additional hour proposed by the plaintiffs to handle the Daubert motions. The total is four hours, two hours per side for the end-payor plaintiffs' motion, and the Daubert motions. No additional time according -- from the defense -- in the defense proposal. And one additional hour in the plaintiffs' proposal. We'll go the plaintiffs' route and allocate a total of seven hours. I'm sorry, five hours, and two hours for the direct -- for the DPP motion.

You were identical -- your recommendations were identical with respect to that motion, so we'll allocate seven hours. I hope this hasn't been too complicated. Four-hour total for the EPP motion and one hour for the Daubert motions related to the EPP motion, and then --

MR. SENATOR: Your Honor --

THE COURT: -- two hours for the DPP motion, one hour per side.

Yes, Mr. Senator?

MR. SENATOR: On the EPP motion can we allocate within our argument of the total of two and a half hours per side how we see fit or how it becomes apparent from the hearing that the Court wants to proceed?

THE COURT: The answer is yes. I'm not going to stick to these arguments. I've -- I have to tell you, the -- I find the arguments presented rather complicated. And they present a myriad of issues. And the -- I have not come close to deciding what to do. The ascertainability issues and the damages issues and -- well, I'm just picking those two -- were troublesome and I'm not sure how I'm going to resolve them, but I am not going to cut you short. I'm not going to sit there with an hourglass. I want to get it right. And I think then we'll keep the two days. We're not going to finish in one day.

As far as experts are concerned, I don't know now which experts are going to be required. I think you -- and I told you this before, you've identified many, many more experts than we'll use at trial. I mean, the -- let me just go to my list. The -- with respect to the EPP motions, the -- on the ascertainability issue, the defendants' and the plaintiffs' motions, two separate experts, of course, but then the end-

payor plaintiffs have two experts they identify, first of all, as ascertainability experts on rebuttal. So the end-payor plaintiffs have three experts on ascertainability. I suppose it was absolutely necessary to do that, but I fail to see the reason why. And I'm not going to -- I haven't decided now that we need any experts. I'm going to rely on you at the first instance.

If I decide at the end of the argument, the presentations, that we need expert testimony, we'll schedule it. We'll schedule it then. But I'm not -- and I'm not going to go forward with the summary judgment scheduling or limitation now. I have no idea whether I'm going to grant any of the motions for class certification. And if we need another hearing, I don't know how long it will take to schedule.

And I note also that the end-payor plaintiffs seek additional discovery on the issue of ascertainability, which the defendants say will throw any schedule in place out of sync.

MR. WEXLER: Your Honor, this is Ken Wexler. We really don't seek additional discovery at all for ascertainability, but obviously isn't coming through and --

THE COURT: I thought -- just let me turn to my notes.

MR. WEXLER: Sure.

THE COURT: I'm just looking. I thought -- I'm

looking at my notes. Somewhere in the mass of papers I have, end-payor plaintiffs asked the Court -- asked me to open -- reopen fact discovery so they can serve --

MR. WEXLER: No. No.

THE COURT: -- 31 new subpoenas to PBNs, pharmacies, and TPPs to try to satisfy the ascertainability requirement. The defense --

MR. WEXLER: Now, can I explain, Your Honor? I mean --

THE COURT: Well, let me just finish. The defense says --

MR. WEXLER: Okay.

THE COURT: -- the existing evidence does not show that the class is ascertainable. Defense also argues that reopening discovery would, and I'm quoting, "completely derail the schedule for the case." So all I'm doing is responding to what you had submitted to me.

Now you can explain.

MR. WEXLER: Okay. What we've done is, you know, as Your Honor knows, under existing ascertainability law, we have to show that we can identify class members. And what we provide is a reliable and administratively feasible methodology for serving that purpose. We can identify them through the issuance of subpoenas, as we described. There -- the -- every case has said over and over again it is not required that we

actually do at this time. But what we have done through our experts is try to demonstrate that it can be. If we were required to do it, we can do it, but the law says we are not required to do it at this time, only to show you that it can be done.

So I know the defendants argued and that we're trying to reopen discovery, but we really don't want to reopen discovery. We don't want to issue subpoenas now. The subpoena process is part of our methodology to show you that we can do it. That's all.

THE COURT: Is there some issue regarding the position of the PBMs? You have -- you're going to issue subpoenas to PBMs, pharmacies, and others.

MR. WEXLER: Well, that's what we would do. That's what we would do to identify people. That's what we would do. We can do it and that's why we have on-point analytics that says if you subpoenaed this data, we could analyze it and come up with a list of class members. It's a --

THE COURT: Now, what is the evidence -- I'm sorry. What is the evidence of how the PBMs and the pharmacies would respond? PBMs first.

MR. WEXLER: Well, that's a good question. And that's why we put in a declaration from a claims administrator who has said we've actually received this kind of data (indiscernible) subpoena previously and used it to identify

class members in a claim process. So we've shown that it has been done and that we can do it if need be.

I mean, our named plaintiffs also have produced data from their PBMs which show their identities and the identities of class members to the extent possible, given what the document requests were. But we can do it, that's all we're trying to show you, that we can do it. That every transaction in the pharmaceutical area involving Niaspan is recorded and the purchasers are recorded and can be identified. That's it. We don't want to go out and do it; it's not required.

THE COURT: Well, this was an explanation about the need for further proceedings. We might very well have to reschedule hearings if I decide that we need additional -- well, it would be testimony. We could certainly get through argument in the two days we've allocated; we'll have more than enough time. If we need experts, I'll decide that as we go along.

Right now, because you've got some 30 experts, I'm not picking and choosing. I want to see how the argument unfolds. It would be good if we could get through the class certification hearing without th need for experts, but if I decide -- and perhaps you'll decide, you'll argue to me that we need expert testimony. I'll certainly consider that. I want to have the record as complete as it needs to be to enable me to rule appropriately. But for now --

MR. WEXLER: Your Honor, Ken Wexler again.

THE COURT: Yes.

MR. WEXLER: I think our anticipation, or the -- or setting aside additional time in the event you heard expert testimony was with respect to the Daubert motion which puts certain experts' credibility into question. That was all we were referring to. Not all the experts, just these class certification folks.

THE COURT: Right.

MR. WEXLER: And there's three Dauberts pending on class -- well, all involving -- one on the so-called premium pass-through and two of our ascertainability experts, so that's all we were referring to there.

THE COURT: Well, as far as the -- but I wasn't referring to that, although we might very well --

MR. WEXLER: Okay.

THE COURT: I might very well decide after the argument that we need the testimony of the experts who were challenged by Daubert motions, and -- but I was thinking of experts to more fully develop the record on the major class certification issues. And I'm not -- I don't have a grip on that now, and I'm concerned about damages.

I know what the cases say about damages, and I know how you disagree over the proof of anti-trust injury and aggregate damages, but I'm concerned about proof of damages at

the end of the road. I've been there just recently and found it almost brick wall like. There was just no way of proving damages by common evidence, and we never resolved the question and the case was settled.

But that's what I have in mind, so we'll go forward on the dates we selected. The dates are May 13th and 14th? Let me get the calendar. I think 13th and 14th. I don't have my calendar. I'll get it.

MR. WEXLER: I think it's the 14th, Your Honor, 14th and 15th.

THE COURT: You're right. It's the 14th and 15th, Tuesday and Wednesday.

MS. ALLON: Your Honor, what time should we plan to start on the 14th?

THE COURT: What -- well, you're obviously not coming in the morning of the 14th. I thought we'd schedule that for ten o'clock.

MS. ALLON: I don't think any of the orders specified a time. I think we had talked about it, so I just wanted to confirm.

THE COURT: Well, does ten o'clock work for you? Do you guys want to talk first, coordinate first in person? Do you want to start at 10:30? I'll leave it to you.

MR. SORENSON: Your Honor, this is David Sorenson. I think 10 is fine, and it's been suggested before and I haven't

heard any objection. Obviously, if someone has a particular issue, they can speak up, but I think 10 is fine.

THE COURT: Okay. Then we'll convene on -- ten o'clock on Tuesday the 14th, and plan to go the whole day. We will recess for lunch, not a long, luxurious lunch. We'll recess for lunch and we'll go as late as we need to go that night and pick up the next day.

If during the course of the proceedings we decide we need expert witnesses either on your request or because I think it's necessary, we'll address that issue and go through a schedule for any experts who will be called.

All right. Is there anything else we need to address on scheduling of the class certification here? Hearing nothing, we'll proceed. I told you as far as scheduling further proceedings, I have no idea where we'll go and when we'll do that. I don't want to schedule in such a way that we have to interrupt and amend, and the scheduling has dragged on -- I use that -- those words in quotes -- to the point where any motion for summary judgment will have to be handled by a new law clerk. Not optimum.

We have one law clerk now up to speed. He leaves. The goal that we set initially was a goal that would have enabled him to address the class certification issues and to handle motions for summary judgment, as well. Not so now. Your suggestions tell me that you want at least six or eight

weeks aside, and if we start that time -- that clock running at the time of the hearing on class certification, we're at the end of August, and my clerks leave beginning mid-August. And I don't want to assign a brand spanking new clerk to this case. So there's no rush to do it now.

My thought is I'll have a better grasp of the issues after we complete the hearing on class certification and I'll consider setting a schedule for the summary judgment motions at that time. I don't think you'll be working -- had planned to work on summary judgment in the next two weeks, although you don't have to answer that question. You might very well have. All right. Is there anything else that needs to be said about summary judgment motions and further scheduling?

Hearing nothing, the fourth item on your agenda is the status of settlement discussions. What kind of news do you have to impart?

MR. SORENSON: Your Honor, this is David Sorenson. I think that this item is on the agenda pursuant to your direction that you wanted us to address it. I believe that's the case. In any event, at least in terms of the direct class, there's nothing new to report. The situation is the same as we previously described it to Your Honor. That is we made a demand some time ago. We have not gotten a response from either defendant.

I think, at least based on prior statements on prior

calls, I think the plaintiffs and the defendants, at least the direct class plaintiffs and the defendants are of a similar view that it might be most productive to have discussions after summary judgment briefs are in. The plaintiffs are -- you know, we're willing to talk at any time, but I agree that in terms of how productive that would be, I think it's probably true that it will be most productive after the briefing.

I think the parties disagree in terms of method. The plaint -- the direct plaintiffs I think had previously said that a mediator would be useful. At least previously the defendants had indicated, if not opposition, that they did not support it, but obviously they can speak for themselves on this call. But the bottom line is, Your Honor, nothing from the direct classes' perspective has changed since previous reports of this subject.

THE COURT: Thank you.

MR. KODROFF: Your Honor, this Jeffrey Kodroff for the end payors. Just to lay it out quickly, we are in a very similar position. We made a very reasonable -- what we felt obviously was a reasonable demand. Defendants have not decided to respond. My only difference from Mr. Sorenson's comment is based on some experience my firm has had with Mr. Saint-Antoine and Your Honor in another case, sometimes things could be resolved sooner and don't need all the orders, but obviously it takes two to tango. If defendants are not ready to go, then

there's not much we can do.

THE COURT: Well, I think we'll turn to the defense now. I think you're right, Mr. Sorenson. You refreshed my recollection I was the one who asked that this be placed on the agenda. And I was mindful of what had been said at a prior conference, and that was that it might be appropriate to address settlement again after the summary judgment briefing was complete but before I decided summary judgment motions. That was set at one time.

Let me hear from the defense. Mr. Senator, are you going to speak for the defense to lead or someone else?

MR. SENATOR: I'm happy to start, Your Honor. And our view hasn't changed either that it does make sense to target the end of summary judgment briefing or the summary judgment oral argument period as the most productive time to have significant settlement discussions.

THE COURT: Well, I have to tell you that, knowing how you worked this case, how all of you worked this case, I really don't see how summary judgment briefing is going to make that much of a difference. I think you know what will be in one another's motions and responses and can address the question of settlement when you make up your minds to sit down and seriously look at the issues and talk settlement. I don't see how summary judgment briefing is going to make that much of a difference, and I can -- I do know that it will be

frightfully expensive.

Now, I know how much -- I know what the demands are, and when I say frightfully expensive, it will be expensive, but in contrast to the demands, certainly not a turnoff. Has that moved anyone to suggest that we move on settlement sooner? I guess that would be you, Mr. Senator, or another person representing defendants. I guess the answer is no.

MS. ALLON: Your Honor, this is Devora Allon for TEVA, and our position is the same. Until we get revised, significantly lower demands from the plaintiffs, we do not feel there is a basis for mediation.

THE COURT: Well, let's not -- that has --

MR. SORENSON: Your Honor, this is David Sorenson. I'm sorry, I didn't mean to interrupt you.

THE COURT: I was going to say that hasn't been said yet, Ms. Allon, not today. I think you said that at time one when we got the demands last fall, but it wasn't said today and --

MS. ALLON: And I just meant, Your Honor, it remains unchanged from the day after we received their demands.

THE COURT: Okay. All right. Well, this might be a case we'll try, and if that remains your position, but I don't think it will. And I'm not sure what the plaintiffs propose. Let -- these comments on settlement raise two issues. What is the defense position on mediation at an appropriate time?

MS. ALLON: Your Honor, I think our position is we're not going to rule it out at an appropriate time, but we've also settled many cases just dealing directly with these same lawyers. So we feel pretty confident in our ability, if and when the parties are ready to have settlement talks, to do those lawyer-to-lawyer and not necessarily need a mediator to help facilitate those discussions.

MR. SORENSON: Your Honor, this is David Sorenson. May I comment on that?

THE COURT: Absolutely.

MR. SORENSON: I think that while it may be true in some abstract sense that the lawyers on this call can talk to each other about settlement either in person or over the phone, I think the presence of a mediator, at least in our experience, can help both sides in the sense that an outside mediator, presumably one that both sides agree on and therefore respect, can basically talk bottom-line issues to both sides and sort of tell the plaintiffs, if appropriate, that the demand should be lower or that your expectations should be lower. And by the same token, tell the defendants, if appropriate in the mediator's view, you have to get more realistic about your exposure.

And then that process can then help both sets of lawyers speaking -- to speak to their respective clients, right, so that for the plaintiffs, and we talk to the

representative plaintiffs and other large class members, here's -- you know, here's an outside realistic view that we're being given by a mediator, and the same goes for the defendants. They can talk to their clients and say, regardless of what they may have said to them previously, here's what an outside mediator is telling us about your exposure.

And so it's that element that I think can be very helpful. Not always, but it has proven to be helpful in our -- in my view certainly in the past, so that's what I wanted to say about that.

MR. SENATOR: This is Stewart Senator. I don't disagree with what Mr. Sorenson has said. In some cases that is helpful. We have found in cases we've dealt with these plaintiffs on that sometimes it is helpful and sometimes we can get there without it. And so that's why we're not ruling it out, but we're at the same point not agreeing to it now because we think that's premature and we should see how things play out. Then we all know how to agree to it and how to choose a mediator together if and when that looks like it's going to move things forward.

THE COURT: Well, I will have more to say on this. I chaired the Court's ADR committee and -- for years, during the entire time we had a separate ADR committee. We folded it into our civil business committee, and although I'm still active, there is no longer a separate chairperson. The idea of a

mediator is to facilitate a settlement, and I think Mr. Sorenson said it very well. If the plaintiffs choose not to quickly flex on their demands, it will take a mediator to tell them they're too high.

And I certainly don't think -- well, we should give the lawyers I think in every case an opportunity to explore settlement on their own. But failing that, particularly where the stakes are this high, I think it appropriate to start thinking of an appropriate mediator early on, earlier, sooner rather than later.

But based on everything I've heard today, it's now too soon. And we'll see how things unfold on May 14th and 15th. Maybe the argument and discussion will lead you to a change of minds, but for now I understand your positions. I can tell you that I favor mediation and will be -- I don't want to say pushing it because it's voluntary. You're going to have to go there. You're going to have to agree. But I think that might be the way to get the case settled. It was the way in which my two prior anti-trust MDLs settled, mediators in both.

All right. I think we've explored the issue of settlement. Unless someone has anything else to say, anyone else want to comment on settlement?

All right. The last item on your agenda is scheduling of the next telephone status conference. I think what we'll do is defer on this until the class certification

hearing. We'll see how that unfolds. What happens will certainly impact the scheduling of the telephone conference, and we'll decide then what's appropriate.

For example, if we determine there's a need for expert testimony, we'll schedule that first and schedule the telephone conference around that. But I don't think anything can be gained by scheduling the next telephone conference today. I assure you, though, we won't adjourn the class certification hearing without another telephone conference scheduled.

All right. Is there anything else that we need to address today? I'll hear from the end-payor plaintiffs first.

MR. WEXLER: No, Your Honor, nothing.

THE COURT: Direct purchaser plaintiffs.

MR. SORENSON: No, Your Honor.

THE COURT: How about Abbvie, Mr. Senator or anyone else?

MR. SENATOR: No, Your Honor.

THE COURT: Ms. Allon?

MS. ALLON: No, Your Honor.

THE COURT: Mr. Perwin?

MR. PERWIN: Nothing, Your Honor.

THE COURT: Mr. Refsin?

MR. REFSIN: No, Your Honor.

THE COURT: Mr. Hill, anything?

MR. HILL: No, Your Honor.

THE COURT: All right. On that note I'll end the conference. I'll see you all 10 a.m. on Tuesday the 14th. Look forward to it.

MR. HILL: Thank you.

THE COURT: Thank you all very much.

MR. ALLON: Thank you.

MR. WEXLER: Thank you, Your Honor.

(Proceedings concluded at 3:36 p.m.)

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C E R T I F I C A T I O N

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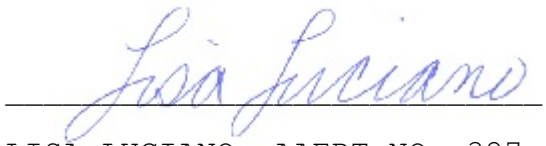

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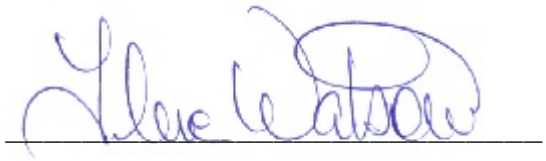

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